

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOSE BRUNO,

Plaintiff-Appellant,

-against-

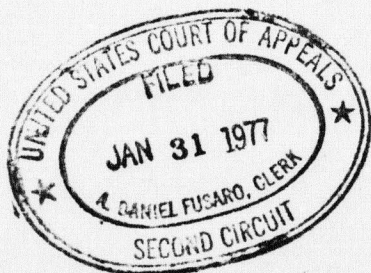
DOCKET NO. 77-6001

DAVID MATHEWS, Secretary of Health,
Education and Welfare,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT



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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the court below erred in finding that the Secretary's denial of benefits to claimant was based upon an examination of the whole record.
2. Whether the court below erred in finding that there was substantial evidence to support the Secretary's resolution of conflicting medical opinion where such evidence is in clear disregard of the overwhelming weight of the evidence in the record viewed as a whole.
3. Whether the court below erred in finding that the Secretary had sustained his burden of showing the availability of substantial gainful activity in which the claimant is capable of engaging.
4. Whether the court below erred in affirming the Secretary's denial of benefits to the claimant where the Secretary failed to consider the combined effect upon the claimant of his several ailments.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the decision of the United States District Court, Southern District of New York, Judge Robert L. Carter, granting the Secretary's motion for summary judgment. The case below was brought under Section 205 (g) of the

.. Social Security Act, as amended, 42 U.S.C.,
.. Section 405 (g), to review a final decision of the
decision of the appellee, the Secretary of Health,
Education and Welfare, which denied the claimant's
application for disability insurance benefits.

B. Prior Proceedings

Claimant filed an application for a period of disability and for disability insurance benefits on March 22, 1974 (Tr. 67-70). The application was denied initially on July 16, 1974 (Tr. 72). The claimant requested reconsideration, and on September 13, 1974, the Secretary affirmed his initial determination (Tr. 76). Claimant requested a hearing to review that decision, (Tr. 27), and on March 28, 1975, a hearing was held before an administrative law judge. After appearances by the claimant, his attorney, his wife, a vocational expert, and an interpreter on April 9, 1975, the administrative law judge found that claimant was not under a disability (Tr. 12-18). The administrative law judge's decision became the final decision of the Secretary of Health, Education and Welfare when the Appeals Council approved the decision on June 27, 1975 (Tr. 6). The action below was commenced October 20, 1975. After the filing of cross-motions with supporting memoranda by both parties, the court below issued its decision granting

the Secretary's motion for summary judgment on October 8, 1976, and judgment was entered October 14, 1976.

C. Statement of Facts

The claimant is a thirty-five year-old Puerto Rican male, with a first grade education (Tr. 78). He is unable to speak or understand the English language (Tr. 30). His current living expenses are being met by public assistance (Tr. 38).

In 1966, while employed as a heavy equipment operator by a construction company in Puerto Rico, claimant was involved in an accident in which the machine he was operating overturned (Tr. 84). Claimant suffered a compression fracture of his spine and was hospitalized for twenty days to receive treatment (Tr. 85). Thereafter, despite the experience of pain and discomfort in his back, (Tr. 78, 84), claimant continued to work both in his original occupation and later, commencing in 1968, with his arrival in New York City, as a general factory laborer and fork-lift operator for the Ramirez-Zayas Company (Tr. 37, 68, 80).

In July, 1973, claimant was laid off from this employment (Tr. 78). He chose to take advantage of the free time that resulted from the loss of his job to seek treatment for his back condition

which prevented him from bending, climbing stairs, lifting heavy objects, and sitting and standing for long periods of time (Tr. 80), through his union's hospitalization program (Tr. 45). He was hospitalized and placed in traction for fifteen days at Prospect Hospital (Tr. 91). This hospitalization and further treatment under physicians at the Hunts Point Multi-Services Center, where he was placed in a back brace, directed to use a cane, and advised not to work (Tr. 44, 80, 93), made it impossible for claimant to return to his previous occupations and prompted him to make his application for disability benefits.

Claimant's condition makes it necessary for him to have assistance to engage in his daily activities. He is unable to dress himself (Tr. 62) and rarely leaves his apartment unaccompanied by his wife (Tr. 63).

The medical evidence in the record discloses that the claimant was hospitalized at Prospect Hospital from November 5th through 20th, 1973 for treatment of "low back pain" and "diabetes mellitis." Although he was placed in traction as the treatment he received for his back condition, the hospital's discharge summary notes that "little improvement" resulted (Tr. 91).

A physical examination claimant underwent during his treatment at the Hunts Point Multi-Services Center on January 30, 1974, notes that claimant has a history of "low back pain - off and on since his accident and injury to spine in 1966 (Tr. 112)." Thereafter, the medical record of claimant's treatment at the Hunts Point Center (Tr. 111 - 130, 134 - 145), contains frequent and repeated references by physicians treating claimant to his back ailment, and to the pain and discomfort caused to claimant thereby, the most significant of which claimant's counsel enumerated and set forth in a letter dated April 23, 1975, to the Secretary's Appeals Council (Tr. 10). An x-ray report dated July 30, 1974 (Tr. 120), discloses a finding of a "compression deformity of the anterior portion of the body of L1 most probably as result of old compression fracture" and "the T 12 - L1 disc space is narrowed and osteophyte formation is seen in margins of adjacent vertebral bodies." A second, later x-ray report, dated February 27, 1975 (Tr. 133), discloses virtually identical findings.

In a letter dated March 18, 1974 (Tr. 92), Dr. Dennis Wise set forth his conclusion that claimant had become "disabled" by virtue of the "back pain" for which he was receiving treatment and was therefore in need of "social service disability." In the first of two forms furnished by the Secretary and completed by Dr. Wise, both dated June 10, 1974 (Tr. 93), he set forth "back pain" and "weakness in left leg" as claimant's principal ailments, and indicated that the treatment being administered for these conditions consisted of "heat, rest, Darvon, Valium and a back brace."

In the second completed form (Tr. 95), Dr. Wise twice indicated "back pain" as claimant's principal ailment, and in response to detailed questions opined that claimant was unable to perform any bending or stooping movements or to lift objects in excess of twenty-five pounds, and stated that "patient will have back symptoms on and off for remainder of life." He further gave the opinion that claimant had an "unlimited" capacity to both walk and sit.

Dr. Frank Petersen-Baez, who succeeded Dr. Wise as the claimant's treating physician at the Hunts Point Center stated in a letter dated December 16, 1974 (Tr. 109), that the claimant "is

unable to bend over nor sit for any long periods of time," and, as a consequence of these limitations in mobility as well as his interpretation of the x-ray findings hereinabove set forth, that claimant is "unable to work."

Dr. Serafin Izquierdo, a Chiropractor, stated in a letter dated March 11, 1975 (Tr. 132), that the claimant "has acute pain in lumbar region with radiating pain up toward the neck. Coughing or straining produces pain in low back area...All spinal motions are limited due to spasm and pain present. Due to my examination and x-rays my prognosis is poor. I feel that Mr. Bruno will progressively get worse."

Dr. Theodore Romana, in a letter dated April 2, 1975 (Tr. 136), states that "obesity and low back pain syndrome prohibits patient from doing strenuous and gainful activities."

Claimant's experience of headaches (Tr. 42), is documented in numerous entries from his medical record: "Complains of headaches and dizziness (3/25/74; Tr. 116); occasional pulsating occipital headaches at night - last few minutes (7/29/74; Tr. 119); headache off and on (9/4/74; Tr. 119); occasional throbbing pain at occipital and back of neck (3/31/75; Tr. 135)."

Claimant also experiences pain in his left heel which is caused, as indicated in an x-ray dated December 10, 1974 (Tr. 123), by a "moderate spur formation" and by "small calcific fragments." A report of a physician's examination of claimant in regard to this impairment, dated December 23, 1974 (Tr. 145), discloses "pain on palpitation - walks with limp and is extremely handicapped due to its discomfort." A second report dated January 13, 1975 (Tr. 145), discloses "some reduction in heel pain - but pain on palpitation (?) and weight-bearing persists."

Claimant also suffers from diabetes mellitis. This condition fluctuates sharply from being "out of control" (Tr. 121) to "under control" (Tr. 91). In his letter dated April 2, 1975 (Tr. 136), Dr. Romana states in regard to this condition that "diabetes mellitis is very labile [unstable] and blood sugar still fluctuates; moderate control at present."

Finally, the record discloses observations by employees of the secretary of adverse physical manifestations of claimant's condition. In the course of an interview held on March 22, 1974, the interviewer noted that the claimant "had difficulty getting up from chair" and "looked uncomfortable sitting " (Tr. 82). At a later interview on July 23,

1974, the interviewer noted that claimant "walks slowly and with apparent discomfort" and, that he "got up and sat down several times during the interview as if uncomfortable in either way " (Tr. 89).

A "vocational expert," Dr. Sidney Fishman, appeared and gave testimony at the hearing held March 28, 1975. When asked to assume the truth of the claimant's testimony, he gave the opinion that the claimant "could not work on any job " (Tr. 52). In response to a second hypothetical, which limited his consideration to a list of factors the law judge enumerated which included a series of restrictions on claimant's capacity to perform physical tasks, Dr. Fishman gave the opposite opinion that claimant was capable of working in a number of job categories (Tr. 53). Dr. Fishman later disclosed that in giving his second answer he disregarded claimant's reports of pain and discomfort (Tr. 57). He also indicated that the specific duties of the job categories he had specified had in common the feature that they are performed in a seated position (Tr. 48), that in order for the claimant to continue performing his duties at such jobs from a standing position or from a high stool, he would be required to bend over (Tr. 48), and that if such a shift from a seated to a standing position entailed an interruption in his

work, such an interruption would only be permitted to last "a minute or two " (Tr. 59).

ARGUMENT

I

ACTIONS OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE UNDER THE SOCIAL SECURITY ACT ARE TO BE REVIEWED IN LIGHT OF THE FACT THAT THE ACT IS A REMEDIAL STATUTE, TO BE BROADLY CONSTRUED AND LIBERALLY APPLIED.

This court has held that in regard to applications for disability benefits "the standard for eligibility is to be applied in light of the fact that 'the Social Security Act is a remedial statute, to be broadly construed and liberally applied.' Haberman v. Finch, 418 F.2d 664, 667 (2d Cir. 1969)."
Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 41 (2d Cir. 1972). In regard to implementing the foregoing construction of the Social Security Act, one court has stated, in Gardner v. Brian, 369 F.2d 443 (10th Cir. 1966) that:

Reviewing courts are also charged with the duty to construe legislation in the light of ascertained Congressional policy. "[They] are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." National Labor Relations Board v. Brown, 380 U.S. 278, 291, 85 S. Ct. 980, 988, 13 L.Ed.2d 839.

As authority for its construction of the Social Security Act, the court in Gold also cites Senior Circuit Judge McAllister's dissenting opinion in Floyd v. Finch, 441 F.2d 73, 76-78, 104-105 (6th Cir. 1971). In the case of Davidson v. Gardner, 370 F.2d 803, 823 (6th Cir. 1966), Judge McAllister further holds:

The foregoing authorities clearly enunciate the law to the effect that it is the duty of courts to examine meticulously the evidence, no matter how burdensome that duty is, because of the helter-skelter nature of the records in these cases, and not adopt the facile way of disposing of an injured applicant's case by reference to, and reliance upon, the statements of one or two physicians, as against the considered statements of many physicians and surgeons who have had more opportunity of examining and treating the applicant, more occasions of making medical reports upon him, and more expertness in diagnosis, as well as upon consideration of the facts reflected in the transcript as a whole.

In a similar vein, the court in Selevich v. Finch, 312 F. Supp. 191, 195 (D. Mass. 1969) held that a claimant for disability benefits under the Social Security Act "is entitled to have the medical evidence presented to the examiner viewed by him and by this court in a light most favorable to her. Lebee v. Cohen, 408 F.2d 998, 1000 (5th Cir. 1969)."

Finally, a disability claimant's burden of proving a

disability exists need not be "carried to a point beyond reasonable doubt." Danielson v. Weinberger, 377 F. Supp. 490, 493 (C.D. Cal. 1974).

II

THE COURT BELOW ERRED IN FINDING THAT THE SECRETARY'S DECISION HEREIN WAS BASED UPON AN EXAMINATION OF THE WHOLE RECORD.

In its opinion the court below makes a finding that "the administrative law judge's findings are...based upon an examination of the whole record" (Opinion, 1). That this finding is in error becomes clear upon an examination of the findings of the law judge that are crucial to his ultimate conclusion of non-eligibility, and of the portions of the record that he failed to consider in arriving at such findings.

This court, in its decision in Carnevale v. Gardner, 393 F.2d 889, 891 (2d Cir. 1968), has held that a denial of disability benefits by the appellee must be reversed where such denial is based upon an administrative decision which ignores important evidence in the record:

Thus it is clear that in summarizing and sifting the evidence in this case, the Hearing Examiner totally ignored a major piece of evidence which might well have influenced his decision. We cannot fulfill the duty entrusted to

us, that of determining whether the Hearing Examiner's decision is in accordance with the Act, see, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456 (1951); Thomas v. Celebrezze, 331 F.2d 541 (4th Cir. 1964); Boyd v. Folsom, 257 F.2d 778 (3rd Cir. 1958), if we cannot be sure that he considered some of the more important evidence presented...

The U.S. Court of Appeals for the Third Circuit has taken a similar position in Baerga v. Weinberger, 500 F.2d 309, 312 (3rd Cir. 1974), cert. denied 429 U.S. 931, 95 S. Ct. 1133, 43 L.Ed. 2d 403 (1975):

.....We express concern over the brief treatment given by the examiner in evaluating the evidence...As a fact finder he has the right to reject their testimony entirely, but failure to indicate rejection could lead to a conclusion that he neglected to consider it at all... Furthermore, in his "evaluation," the Examiner gives no clue as to why he chose to accept certain medical evidence and reject contradictory evidence. See, Kennedy v. Richardson, 454 F.2d 376 (3rd Cir. 1972)... For example, there is no reference in the "evaluation" to [five instances of disregarded medical evidence].

The practice of ignoring competent evidence contrary to the conclusions reached by the appellee's law judges has consistently resulted in reversal by reviewing courts. "The Secretary may weigh conflicting evidence but he cannot ignore competent evidence. He

cannot reach a conclusion first and then attempt to justify it by ignoring competent evidence in the record that suggests an opposite result." Rayborn v. Weinberger, 398 F. Supp. 1303 (N.D. Ind. 1975). See also Smith v. Weinberger, 394 F. Supp. 1002, 1007 (D. Md. 1975); Szumowski v. Weinberger, 401 F. Supp. 1015, 1017 (F.D. Penn. 1975).

The law judge's decision herein clearly fails to satisfy the standards enunciated in the foregoing decisions. At page 5 of his decision, (Tr. 17), he states "that the medical evidence would not support a finding that the claimant's complaints [as to pain] are valid." However, at no point in his decision does the law judge make reference to or otherwise indicate he has given consideration to the following statements in the record by treating physicians which verify the claimant's reports of back pain:

a) Numerous entries setting forth the diagnostic conclusions of claimant's treating physicians at the Hunts Point Multi-Services Center:

1. 2/28/74: "(illegible) pain in T-L spine with radiation to neck and lumbar area into left leg" (Dr. Wise) (Tr. 139).
2. 3/18/74: "Pain in left flank area and left leg " (Tr. 139).
3. 4/29/74: "Have some increased pain occasionally sharp radiating into neck " (Tr. 138).

4. 10/25/74: "Still having low back pain for past several days " (Tr. 122).

5. 10/31/74: "Same complaint of low back pain...low back pain even with bed rest " (Tr. 141).

6. 2/4/75: "Still with low back pain " (Tr. 145).

b) Discharge summary from claimant's hospitalization at Prospect Hospital (Tr. 91), which notes that "little improvement" resulted from having been placed in traction as treatment administered for "low back pain."

c) Letter from Dr. Serafin Izquierdo (Tr. 132), in which it is stated that the claimant "has acute pain in lumbar region with radiating pain up toward the neck. Coughing or straining produces pain in low back area...All spinal motions are limited due to spasm and pain present. Due to my examination and x-rays my prognosis is poor. I feel that Mr. Bruno will progressively get worse."

d) Letter from Dr. Theodore Romana. (Tr. 136), which indicates that "obesity and low back pain syndrome prohibits patient from doing strenuous and gainful activities" and also lists "diabetes mellitis" and "essential hypertension" as other ailments from which the claimant suffers.

Reviewing courts have consistently condemned disability benefit denials by the Secretary which fail

to give adequate consideration to subjective evaluation by the treating physicians of claimants, particularly where the issue of pain is involved. In Homm v. Gardner, 267 F. Supp. 926, 929 (D. Mo. 1967), the court stated:

Perhaps the validity of such a regulation could be sustained if one understands, as the hearing examiner in this case obviously did not understand, that the recognition, assessment, and evaluation of subjective complaints of pain are integral parts of a proper clinical diagnosis.

Failure to understand and failure to give that language such a meaning produces the inevitable result that the presence of actual pain is effectively eliminated as a cause or a significant factor in the evaluation of physical or mental impairment by administrative fiat.

The Ninth Circuit, in Flake v. Gardner, 399 F.2d 532, 540 (9th Cir. 1968) has interpreted the term "clinical" as found in the Social Security Act, and left little doubt that it regarded a physician's evaluation of his patient's reports of pain as being within the meaning of that term:

The statute refers to "medically acceptable clinical *** diagnostic techniques." Stedman's Medical Dictionary, 20th Ed. defines "clinical" as: "2. Denoting the symptoms and course of a disease as distinguished from the laboratory findings of anatomical changes."...

Not all subjective complaints of a patient are accepted by a doctor. But one skilled in the art may well be able, by medically acceptable clinical techniques, to sort them out, to decide which to believe, and to make a diagnosis accordingly. In this case, several doctors, in spite of a lack of "objective" symptoms, believed Flake's complaints and came to a diagnosis on that basis. See particularly the report of Dr. Downing, quoted supra. It is arguable that the Hearing Examiner felt bound to reject those diagnoses. We are not at all sure that the amended statute or the regulations require this.

In the present case, where the claimant has produced evidence of "objective symptoms," there is no basis for even the mild reservation as to the acceptability under the Social Security Act of a physician's evaluation voiced by the Flake court.

Finally, the court in Bishop v. Weinberger, 380 F. Supp. 293, n. 1 (E.D. Va. 1974), stated:

The level of objectivity sought does not, however, require that the medical evidence presented be derived from mechanical, chemical or electrical testing; or that it stand undisputed by other medical experts...[Case citations omitted].

In short, expert opinion based on an examining physician's subjective evaluation of his patient's complaints would be sufficient to corroborate the patient-claimant's own statements as to pain.

It is thus clear that in excluding from consideration or otherwise disregarding an entire category of evidence, i.e., statements by claimant's physicians manifesting concurrence with his reports of pain, that the Social Security Act clearly embraces within its definition of acceptable proof, the Secretary has failed to make his determination herein on the basis of "an examination of the whole record."

Similarly, the law judge fails to make reference to, or otherwise consider the testimony of the claimant's wife, who indicated that the claimant requires her assistance in dressing himself (Tr. 62), and in leaving their apartment (Tr. 63). The Fifth Circuit, in Gaultney v. Weinberger, 505 F.2d 943, 945 (5th Cir. 1974), held that if a law judge "failed to take into account the subjective testimony of [the claimant], his friends, and members of his family regarding the pain he suffers...it would justify reversal or remand." A District Court in this Circuit has also recognized the significance of corroborative testimony from family members of claimants. In Spivak v. Gardner, 268 F. Supp. 366, 372 (E.D. N.Y. 1966), the court stated:

In cases of this kind, objective medical facts and expert medical opinions can carry one only so far. The Hearing Examiner must also consider claimant's subjective evidence of pain and disability, and the corroboration offered by his family, friends, co-workers and employers. Mode v. Celebrezze, 359 F.2d 135, 136 (4th Cir. 1966).

"Where it is not possible to reach a determination based on such evidence, [expert medical opinion] subjective testimony by lay witnesses may be entitled to great weight where it is uncontradicted in the record. Underwood v. Ribicoff, 298 F.2d 850, 852 (4th Cir. 1962)." Laws v. Celebrezze, 368 F.2d 640, 644 (4th Cir. 1966). "If the evidence from the medical experts is inconclusive, evidence from the claimant [and his family and friends] is not only significant, but essential to the resolution of the conflict. Underwood v. Ribicoff, supra. Mrs. Hope testified that she must assist her husband to undress and lie down." Hope v. Secretary of Health, Education and Welfare, 347 F. Supp. 1048, 1053 (E.D. Tex. 1972).

Thus it is once again clear from the Secretary's failure to consider a second important category of evidence that he has not made his determination herein "upon an examination of the whole record."

Furthermore, in one significant instance where the law judge does consider evidence submitted by the claimant, he distorts it. As the claimant pointed out to the Appeals Council (Tr. 10), the law judge chose, in making his findings as to the nature of claimant's back condition, to rely exclusively on one x-ray report from claimant's medical record dated January 30, 1974 (Tr. 114), which the law judge quotes as reporting "a marked narrowing of the T 12-L1 disc space" (Tr. 16). However, not only does the law judge ignore the additional disclosure in this report of "osteophytic bridging of the margins of the vertebral bodies," he ignores two later x-ray reports dated July 30, 1974 and February 27, 1975 (Tr. 120, 133), respectively, which afford a more complete picture of claimant's back condition in that in addition to noting the "bridging" condition, they also disclose a "deformity" (wedge shape: Tr. 133) attributed to an "old compression fracture."

The law judge similarly distorts the contents of the record in regard to the claimant's experience of headaches. He quotes the claimant as stating he experiences headaches "almost all the time" (Tr. 15) when in fact the record is devoid of any such claim. He then selectively isolates one

passage from the claimant's medical record (Tr. 119) in an apparent effort to cast doubt on the claimant's credibility, while ignoring numerous other entries in the medical record substantiating the validity of claimant's claims in this area (Tr. 116, 118, 119 (9/4/74), 135).

In short, the claimant in this case finds himself in the same vexing position as the claimants in Hall v. Celebrezze, 314 F.2d 686, 689 (6th Cir. 1969), or in Taylor v. Cohen, 297 F. Supp. 1281 (E.D. Tenn. 1969), who "had no way of establishing his case if his credible medical evidence is disregarded."

III

THE COURT BELOW ERRED IN FINDING THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE SECRETARY'S RESOLUTION OF CONFLICTING MEDICAL OPINION WHERE SUCH EVIDENCE IS IN CLEAR DISREGARD OF THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THE RECORD VIEWED AS A WHOLE.

In determining whether or not the Secretary's decision in this case is supported by "substantial evidence" (42 U.S.C., §405 (g)), a reviewing court must consider the record "as a whole." Cutler v. Weinberger, 415 F.2d 1282 (2nd Cir. 1975); Administrative Procedure Act, 5 U.S.C.A. §706. In discussing the implications of this standard, the

U.S. Supreme Court, in the case of Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456 95 L.Ed. 456 (1951) stated:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record.

In applying the foregoing principles to Social Security cases, this court, in Dolan v. Celebrezze, 381 F.2d 231, 233 (2d Cir. 1967) has held that in determining whether substantial evidence supports denials of benefits by the Secretary, the evidence must be "viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to his view, Universal Camera Corp. v. National Labor Relations Board," *supra*. In accord: Blanks v. Richardson, 439 F.2d 1158, 1159 (5th Cir. 1971); Covo v. Gardner, 314 F. Supp. 894 (D. N.Y. 1970). A reviewing court "cannot affirm the examiner's conclusion simply by isolating a specific quantum of supporting evidence. Universal Camera Corp. v. National Labor Relations Board," *supra*. Day v. Weinberger, 522 F.2d

1154, 1156 (9th Cir. 1975). See also Tinsley v. Finch, 300 F. Supp. 247, 252 (D.S.C. 1969).

Although not acknowledged in the opinion below, Judge Carter, in the case of Hofacker v. Weinberger, 382 F. Supp. 572, 576 (S.D.N.Y. 1974) recognizes the principle that where the Secretary has placed reliance "on one portion of the record in disregard of overbalancing evidence to the contrary, the court may then interfere with the Secretary's conclusion. See Branch v. Finch, 313 F. Supp. 337 (D. Kan. 1970)." This standard also prevails in the Fourth Circuit where it has been held that "where the Secretary's determination is in clear disregard of the overwhelming weight of the evidence, Congress has empowered the courts to modify or reverse the Secretary's decision"... Vitek v. Finch, 438 F.2d 1157 (4th Cir. 1971), in the Ninth Circuit: Ainsworth v. Finch, 347 F.2d 446 (9th Cir. 1971), and in the Seventh Circuit Hassler v. Weinberger, 502 F.2d 172, 178 (7th Cir. 1974). See also Szumowski v. Weinberger, 401 F. Supp. 1015 (E.D. Penn. 1975).

Appellant does not disagree with the principle articulated by the court below, that, as a general rule, "conflicts in the evidence must be resolved by the Secretary, not by the courts" [citation omitted] (Opinion, 4). His position is identical to that set forth in the case of Cyrus v. Celebrezze, 341 F.2d 192 (4th Cir. 1965):

The medical evidence that Cyrus suffers from a disability is uncontradicted. The only conflict is as to the extent of his residual capacity. Normally, it is for the Secretary and not the courts to resolve conflicts in the evidence. Snyder v. Ribicoff, 307 F.2d 518 520 (4th Cir. 1962). But where the Secretary places reliance upon one portion of the testimony to the disregard of overwhelming evidence to the contrary, the Secretary's conclusions may not stand. Thomas v. Celebrezze, (4th Cir., 331 F.2d 541).

In applying the foregoing principles to the present case, the unbalanced manipulation of the medical evidence by the law judge becomes indisputably clear. In reaching his conclusion as to the severity of claimant's disability, the law judge relies exclusively on the sole item of medical evidence in the hearing record that is in any way adverse to claimant's claim: the opinion of Dr. Wise that claimant has an "unlimited residual functional capacity to sit" (Tr. 95), cited by the law judge and adopted as his own finding at page 4 of his decision (Tr. 16).

Dr. Wise examined the claimant on only three occasions, February 28, March 18, and April 29, 1974 (Tr. 93, 138, 139), in the course of a brief, two-month period. The appropriateness of exclusive reliance on Dr. Wise's judgment in assessing the claimant's capacity to engage in substantial gainful activity is highly questionable for the principle reason that he rendered these opinions on the basis of incomplete information as to the true nature of claimant's back condition. The first

x-ray disclosure of the "compression deformity" in claimant's back occurred on July 30, 1974, three months after Dr. Wise's last examination of the claimant. (This incomplete information may account for Dr. Wise's characterization of the claimant's compression fracture as "healed" (Tr. 95), one which is not shared by any of the claimant's other physicians who had the opportunity to view the later x-ray reports.) It is precisely this disclosure that is cited by Dr. Petersen-Baez as the basis for his opinion, given on December 10, 1974 (Tr. 109), that claimant "is unable to bend over nor sit for any long period of time" and "is unable to work."

The Secretary's own regulation, 20 C.F.R. 404. 1526, provides in part:

The weight to be given such physician's statement depends on the extent to which it is supported by specific and complete clinical findings and is consistent with other evidence as to the severity and probable duration of the individual's impairment or impairments.

See also Griffin v. Weinberger, 407 F. Supp. 1388, 1395 (N.D. Ill. 1975) for a court's citation of this regulation in support of the Secretary's failure to accord weight to a treating physician's opinion. In applying this standard to Dr. Wise it is clear that his opinion was not "supported by specific and complete clinical findings" (emphasis added) in that he did not have access to later x-ray information, and his opinion is certainly not "consistent with other evidence as to the severity..." of the claimant's impairment.

Reviewing courts have not hesitated to reverse denials of claims by the Secretary where they result from exclusive reliance on a single physician's opinion that is both questionable in itself and contrary to the overwhelming weight of the rest of the medical evidence. In Gold v. Secretary of Health, Education and Welfare, 438 F.2d 38, 42 (2d Cir. 1972), the circumstances under which medical report form upon which the Secretary placed exclusive reliance was prepared formed the basis of the court's judgment that it did not amount to substantial evidence. In Mefford v. Gardner, 383 F.2d 748, 761 (6th Cir. 1967), Davidson v. Gardner, 370 F.2d 803, 823 (6th Cir. 1966), Sebby v. Flemming, 183 F. Supp. 450 (W.D. Ark. 1960) the respective courts arrived at similar conclusions based on the lack of contact with the claimant by the physicians upon whom the Secretary attempted to exclusively rely. The court in Taylor v. Cohen, 297 F. Supp. 1281, 1284 (E.D. Tenn. 1969) simply noted in response to a similar effort by the Secretary in that case, "there is no evidence in the record to justify accrediting this testimony to this extreme extent." Internal qualifications in the report upon which the Secretary attempted to exclusively rely invalidated such reliance in Burrell v. Finch, 308 F. Supp. 264, 266 (D. Kan. 1969). In Whittier v. Gardner, 263 F. Supp. 670, 676, (D. Me. 1967), the court, at footnote 10, notes:

In any event, Dr. Archambault would stand alone in the opinion that claimant was capable of working... the entire record, including all the other medical evidence, compels a different conclusion.

See also Mercer v. Mathews, 403 F.Supp. 1350,1354 (E.D. Ky. 1975).

IV

THE TRICT COURT ERRED IN FINDING THAT THE SECRETARY HAS SUSTAINED HIS BURDEN OF SHOWING THE AVAILABILITY OF SUBSTANTIAL GAINFUL ACTIVITY IN WHICH THE CLAIMANT CAN REALISTICALLY ENGAGE, WHERE THE SECRETARY PURPORTS TO SATISFY SUCH BURDEN BY MEANS OF TESTIMONY OF A VOCATIONAL EXPERT GIVEN IN RESPONSE TO A HYPOTHETICAL QUESTION WHICH: 1) UNFAIRLY SUMMARIZED THE CONCLUSIONS OF THE DOCTOR ON WHICH IT WAS BASED, 2) PRECLUDED CONSIDERATION BY THE EXPERT OF THE ENTIRE MEDICAL EVIDENCE AS A WHOLE, AND 3) SPECIFICALLY DISREGARDED THE PAIN AND DISCOMFORT EXPERIENCED BY THE CLAIMANT.

Once a claimant for disability benefits has demonstrated his inability to engage in his previous types of employment, the burden of showing the existence of alternative forms of substantial gainful activity in which he can realistically engage shifts to the Secretary of Health, Education and Welfare. Ber v. Celebreeze, 332 F.2d 293 (2d Cir. 1964); Rinaldi v. Ribicoff, 305 F.2d 548 (2d Cir. 1962); Pollak v. Ribicoff, 300 F.2d 674 (2d Cir. 1962); Kerner v. Fleming, 283 F.2d 916 (2d Cir. 1960); Myers v. Weinberger, 514 F.2d 293 (6th Cir. 1975) McLamore v. Weinberger, 538 F.2d 573 (4th Cir. 1976).

In the present case the Secretary concedes claimant's inability to engage in his previous occupations, inasmuch as

his law judge's findings of fact as to claimant's physical capabilities (Tr. 16), which claimant does not concede are supported by substantial evidence, are manifestly incompatible with the physical requirements of claimant's former occupations (Tr. 80). Such a concession is also reflected in the determination by the law judge, as evidenced in his decision to call a "vocational expert" as a witness (Tr. 98), that the initial denials of the appellant's claim could be sustained only with the aid of such testimony. Therefore the Secretary's decision herein must be reversed unless it appears he has successfully sustained the aforementioned burden. As previously indicated, the Secretary purports to satisfy this burden by means of testimony elicited by his law judge from Dr. Sidney Fishman, a "vocational expert." The question thus becomes whether the law judge elicited testimony from Dr. Fishman in a manner that was proper and in accordance with applicable legal standards. It is the contention of the claimant that he did not.

A. Erroneous Summarization of Medical Evidence.

The court in Haskins v. Finch, 307 F. Supp. 1272 (D. Mo. 1969), held that a vocational expert's testimony was insufficient to support the factual conclusions drawn therefrom by the law judge for reasons that are highly germane to the present case.

First, the Haskins court based its rejection of the vocational expert's testimony on the finding (at 1285) that

the law judge in framing his questions had unfairly summarized the reports of the doctors upon which such questions were purportedly based. The court in Myers v. Weinberger, supra, states:

It is axiomatic that a hypothetical question is not evidence. It shall be an accurate summation of the evidence already presented in the record and can neither add to nor detract from that evidence.

Similarly reasoning is to be found in Trice v. Weinberger, 392 F. Supp. 1196 (N.D. Ga. 1975):

"Opinion evidence without any support in the...physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based."
Washington v. United States, 214 F.2d 33, 43 (9th Cir. 1954); cert. denied, 348 U.S. 862, 75 S. Ct. 86, 99 L.Ed. 679 (1954). Since the assumptions in the hypothetical are not supported by the record, the opinion of the vocational expert that claimant has a residual working capacity is worthless.

The hypothetical question the law judge posed to Dr. Fishman in the present case is based upon the report of Dr. Dennis Wise (Tr. 95). In two separate places in this report Dr. Wise opines that the claimant is incapable of performing bending or stooping movements. These opinions are unqualified. Nevertheless, one of the hypothetical conditions the law judge posed to Dr. Fishman (Tr. 52) was that the claimant be deemed incapable of "doing any work requiring bending or stooping while lifting

more than 15 pounds" (emphasis supplied). This assumption had no basis in the record and therefore the testimony of Dr. Fishman elicited in response to it cannot be used to satisfy the Secretary's burden as hereinabove set forth.

B. Non-Consideration of Medical Evidence As a Whole.

Second, the Haskins court ruled it was improper to prevent the vocational expert from giving consideration to the entire medical record in framing his answers by means of hypothetical questions based on isolated portions of the record:

The testimony rendered by the vocational expert was not based on all of the medical evidence of record, but rather upon "hypotheticals" posed by the hearing examiner, by which the expert was required to assume that the conclusory findings of first one, then the other, of the medical examiners of record were true, when such separate findings ignored pain and other factors required to be considered. Further, the expert was never asked to base his opinions on the medical and other evidence of record...

No question addressed to the vocational expert permitted him or required him to consider the entire medical evidence in combination as it bore upon the considerations to be made by him....rather than merely the separate conclusory opinions of the medical examiners in respect of the degree of activity of which claimant was capable...

Therefore, no substantial credible evidence was received...that there were job opportunities in the national economy suitable for a person of claimant's physical and mental impairments and disabilities. Such testimony was given on

the subject was immaterial because it was based only upon the isolated selected conclusions and ignored a large part of the evidence. Id. at 1283, 1285.

The court cited as authority for its holding the case of Whitt v. Gardner, 389 F.2d 906, 910 (6th Cir. 1968) in which the conclusions of a law judge based upon a vocational expert's testimony were upheld where the law judge instructed the expert "to base his opinion on the testimony and record in the case, and observation of the claimant during the hearing." Furthermore, in Chester v. Mathews, 403 F. Supp. 110, 118 (D. Md. 1975), it was held that a "vocational expert's opinion in a disability case is only worthwhile if it is based on a consideration of all other evidence that has been brought out in the case. Glass v. Weinberger, 517 F.2d 224 (6th Cir. 1975)."

The questioning by defendant's law judge of Dr. Fishman in the present case is clearly in violation of the above standards. Although the law judge ascertained from Dr. Fishman that he was "familiar with the contents of all of these exhibits" (Tr. 51), at no time did he instruct or even permit Dr. Fishman to take these exhibits into consideration in framing his answers to questions posed by the law judge. To the contrary, the law judge specifically omitted mention of the exhibits in the record in enumerating the factors upon which Dr. Fishman was to base his opinions. (Tr. 52: The factors specified by the law judge were the claimant's "age, education, training and work experience as well as certain dysfunctions which I shall set

forth for your consideration...") Dr. Fishman confirmed that in forming his opinion he had in fact ignored the claimant's medical record by prefacing his first answer with a listing of factors he had considered identical to that in the law judge's instruction to him, hereinabove set forth (Tr. 53).

The law judge also erred in failing to take additional testimony from Dr. Fishman in light of the testimony of claimant's wife, which testimony he had no opportunity to consider in framing his answers to the law judge's questions. When a virtually identical factual circumstance was presented to the Sixth Circuit in Mullins v. Cohen, 408 F.2d 39 (6th Cir. 1969) that court held the failure to take additional testimony from the vocational expert in light of medical reports he had no opportunity to consider in his initial testimony required reversal of the Secretary's determination of ineligibility.

C. Disregard of Pain

Dr. Fishman testified that by virtue of the manner in which the law judge framed his second hypothetical question he felt obliged in arriving at his answers to disregard claimant's report of pain and discomfort (Tr. 57). The Haskins court condemned an identical effort by the law judge therein to exclude such evidence from a vocational expert's consideration:

The principal error in all these hypothetical questions is that they unanimously disregard the pain and

discomfort of claimant and the functional overlay, to which "great consideration must be accorded." [Citations omitted]. This error alone makes the answers to the questions irrelevant to the conditions of the claimant in the case at bar: Id. at 1286. (Emphasis Supplied).

The medical report relied upon by the law judge in framing his second hypothetical questions (Tr. 95) was not prepared at Dr. Wise's initiative, but rather consists of his responses to narrowly circumscribed requests for information on a form transmitted to him by the New York State Bureau of Disability Determinations. In Popovich v. Celebrezze, 220 F. Supp. 205, 208 (W. D. Penn 1963), it was held that "doctors' reports made at the request of either the Social Security Administration or claimant's employer's workmen's compensation carrier" were entitled to lesser weight than other evidence in the record. See this court's discussion of a similar problem in Gold v. Secretary of Health, Education and Welfare, 463 F. 2d, 38, 42 (2d Cir. 1972).

Although Dr. Wise states twice in response to earlier questions on this form that the claimant's principle ailment is back pain, the law judge in framing his second hypothetical chooses to isolate Dr. Wise's later responses which, since they make no mention of pain experienced by the claimant, effectively eliminate that factor from consideration. Infact, in common with all other physicians who have treated the claimant, Dr. Wise considered the claimant's back pain so severe as to render him "disabled" (Tr. 92).^{*} "The Secretary may not rely on a

* Furthermore, Dr. Wise's prescription of "rest" (Tr. 93) is incompatible with the claimant's participation in gainful activity.

portion of an expert's report where a fair reading of the entire report indicates that the expert reached a conclusion contrary to that asserted by the Secretary." Hassler v. Weinberger, 502 F.2d 172, 178 (7th Cir. 1974).

The law judge's exclusive reliance on the responses to questions 7 and 8 on the State Bureau of Disability form enables him and the vocational expert to make the conceptual leap from the premise that the claimant has an "unlimited" capacity to sit to the conclusion that he is therefore employable in "sedentary" occupations. However, to eliminate the factor of pain from such a calculation leads to absurd results.

For instance, Dr. Wise also opines that the claimant has an "unlimited" capacity to walk (Tr. 95). In a strict sense this may be true, but what sense does it make to regard claimant who wears a back brace and uses a cane and who walks with "a lurch" (Tr. 139), and, as observed by another physician, "a limp" (Tr. 143) due to the pain he experiences, as being employable in an occupation that requires substantial walking?

Similarly, Dr. Wise's opinion that claimant has an unlimited capacity to sit must be read together with his opinion that claimant "can't bend forward " (Tr. 95). Ideally, it should also be read together with Dr. Izquierdo's opinion that "all spinal motions are limited due to spasm and pain present " (Tr. 132). Thus, while it may strictly be true that claimant can "sit" for appreciable lengths of time in a stationary,

immobile position, it certainly does not logically follow that claimant is employable in "sedentary jobs," all of which require some capacity for movement while seated. The court in Vitek v. Finch, 458 F.2d 1157, 1160 (4th Cir. 1971), rejected a similar attempt by the Secretary to rely on a doctor's report that was similarly ambiguous as to the ability of the claimant to work under the circumstances there at issue (a debilitating heart condition):

Moreover, Dr. Scherlis' classification of Vitek's cardiac condition as I-II-B does not dictate, as the Appeals Council assumed, a conclusion contrary to Dr. Morrison's ... The classification tendered by Dr. Scherlis, unaccompanied by any explanation or judgment as to Vitek's ability to work, provides no "substantial evidence" to support the Secretary's determination.

As previously indicated, Dr. Wise was of the opinion that the claimant is "disabled" by his back condition.

Such an absurdity is reflected in the law judge's tortured efforts to resurrect through semantic quibbling (bending vs. stretching; Tr. 60) the discredited testimony of the vocational expert, who admitted on cross-examination that given the stationary character of the work areas in "sedentary" occupations, bending would be necessary of the claimant were to continue working from a position of either standing or sitting on a "high stool" (Tr. 58, 59).^{*} As Judge McAllister noted in Davidson v. Gardner,

* While not an issue that appellant is directly raising in this appeal, the manner in which the law judge elicited testimony from the vocational expert provides further

Although the Hearing Examiner found that appellee could do no work requiring him to bend over, or stoop because of his back condition, Dr. Auvenshine, the Vocational Counselor, found that this man who had never done anything but manual labor could do bench work, lean over a bench and perform the work of "assembling of small toys, involving putting on wheels, putting things together involving the use of the hands and fingers," cutting cloth in the textile industry and fabricating lightweight metal. If anyone ever saw one cutting cloth in the textile industries, or doing the work of fabricating metal, without bending his back, he has witnessed a prodigy - and the Hearing Examiner found that appellee could do no work requiring bending, stooping or lifting.

Furthermore, the naked, unembellished statement that claimant has an "unlimited" capacity to sit leaves open the question

* Continued.

basis for appellant's doubt, initially indicated in his letter to the Secretary's Appeals Council (Tr. 10), as to the law judge's impartiality. As the Court in Noe v. Weinberger, 512 F.2d 588 n. 1 (6th Cir. 1975) noted:

It seems particularly inappropriate for this administrative agency's Hearing Examiner to be termed a "judge" when the agency supplies no legal representative other than him, and when the Examiner feels required (as he obviously did here), first to develop the government's case and then to judge it.

as to whether the claimant experiences pain in such a posture. Ordinarily, one might look to the subjective testimony of the claimant to fill in this incomplete picture of the claimant's physical limitations. If that had been done in this case, (see Tr. 46), the conclusion that would emerge is that although the claimant may be able to remain in a seated position for an appreciable period, he at the same time experiences such pain in that position that it is unreasonable to conclude that he is able to perform such tasks as assembly or inspection, even though these are "sedentary" in nature. "Congress has in effect stated that if a person is unable except under great pain to engage in substantial gainful activity...he shall be deemed to be disabled for the purposes of this Act." Butler v. Fleming, 288 F.2d 591, 595 (5th Cir. 1961). "...Pain...which is....real to the sufferer and so intense as to be disabling will support a claim for disability benefits. [Citations omitted]" Ber v. Celebrezze, 333 F.2d 293, 299 (2d Cir. 1964). Of course, if one simply eliminates pain as a factor to be considered, as the law judge has done in his interrogation of the vocational expert, then the foregoing question never arises. Santiago v. Richardson, 345 F. Supp. 438 (E.D. Penn. 1972) addresses the above issue directly and resolves it against the Secretary. The claimant in this case suffered from, inter alia, "a fracture with a compression of the first lumbar vertebra" and "has a documented history of complaints of severe lower back pain." The law judge disposed of the claimant's

complaints of pain in precisely the same manner and in reliance upon precisely the same type of medical evidence as in the present case:

The Hearing Examiner, in evaluating the evidence, concluded:

"Despite the abundance of the claimant's subjective complaints they are not supported by the medical evidence of record."

The "medical evidence of record" relied upon is contained in the opinion of a consultative orthopedist who reported that the claimant could stand, walk, sit, bend, squat, kneel and stoop with "no limitation."

The court rejected the Secretary's attempt to discredit the claimant's testimony on his experience of pain by means of medical evidence that was manifestly equivocal on that subject:

Moreover, it is unclear whether the "no limitation" language in the medical report he relied upon was intended to describe the claimant's ability to move, including any accompanying complaints of pain, or regardless of them.

The law judge's inadequate and improper disposition of the issue of the severity of the claimant's experience of pain is nowhere more clearly demonstrated than in his statement (Tr. 16) that he "believes that the medical evidence shows that the claimant experiences back pain from time to time but not of any greater frequency or severity than that experienced by him from 1966 to July 27, 1973 during which time he operated heavy

machinery on road construction and a fork-lift in a factory and a warehouse." This statement is totally without support, substantial or otherwise, under any conceivable reading of the evidence in the record. The claimant stated as follows when questioned as to the duties of his former jobs (Tr. 80):

I would operate bulldozers, etc.
where I had to exert a lot of energy
and involved a lot of movement.

As general worker in factory, I had
to lift boxes of soap for delivery.
I had to pack the boxes, put them
on trucks once packed.

To claim, as the law judge apparently does, that in light of the medical evidence in the record in this case the claimant suffers no greater pain at present than when performing the aforementioned tasks is to defy all logic and reason. And, as was hereinabove indicated (p. 28), the law judge concedes as much in making and acting upon the determination that a vocational expert's testimony was necessary in order for the Secretary's denial of benefits to withstand judicial review.

In short, the claimant's assertions in this case are virtually identical to those of the claimant in Catron v. Weinberger, 394 F. Supp. 1011, 1014 (E.D. Va. 1975), with which the judge therein substantially agreed, "that in questioning the vocational expert present at his hearing, the administrative law judge ignored claimant's testimony of the pain associated with his kidney condition and that the hypothesis

the administrative law judge propounded was improper, leading, and based upon only a partial view of the evidence."

There is a consistent line of decisions which have reversed the Secretary when faced with factual situations similar to the present one. In Graves v. Secretary of Health, Education and Welfare, 473 F.2d 807 (6th. Cir. 1973) the claimant also suffered from a back ailment, which, as indicated in the law judge's findings, caused her to "have difficulty with frequent stooping or bending, and...that she would occasionally or frequently be required to get up from a sitting position." A vocational expert "testified that if the appellant's allegations of pain are taken as true, she would be absolutely unemployable." Then, presumably in response to a second hypothetical question which required him to give less weight to the claimant's reports of pain, he listed numerous jobs in which he felt the claimant could gainfully engage. The court found this testimony to be "an inadequate basis for [the law judge's] conclusion" of ineligibility in part because of the degree to which the vocational expert had disregarded the factor of pain in framing his answer.

The court in Graves also discusses the medical evidence therein in a manner which sheds light on the factors involved on the present case. It is noted that "the hearing examiner's findings on the degree of pain the appellant suffers are at best equivocal (Id., at 810, note 6)." Although the court had earlier noted "an apparent conflict in the testimony over the extent of the appellant's residual capacity to work," it

went on to find:

If this passage [in the hearing examiner's opinion] is to be taken to mean that the appellant's allegations of pain are not supported by the medical record, the hearing examiner is in error. All medical reports in the record tend to support the appellant's testimony as to pain.

In Boggs v. Cohen, 298 F. Supp.175 (W.D. Va. 1969) the medical evidence indicated, as it does herein, that the claimant is unable to "perform lighter work requiring bending, stooping or lifting" by virtue of a back condition that had "caused a fifty percent loss of spinal flexion, extension, and lateral bending." There, as here, a prescribed back brace "provided little relief" from pain, necessitating the administration of pain killing medication (herein: Darvon, Tr. 93, 117, 118). Finally, the law judge therein attempted, as here, to rely on a vocational expert's testimony that the claimant was capable of substantial gainful activity. The court reversed the Secretary with the following pertinent language:

We cannot agree with the conclusion of the hearing examiner that the claimant's almost constant pain symptomatology is unsubstantiated by adequate medical evidence. Nor do we think that three shots per week and aspirin is a "relatively minor amount of medication * * * inconsistent with severe, intractable pain." All the medical evidence in the record tends to confirm the testimony of the claimant

that notwithstanding the back brace and the shots he suffers from relatively constant, severe pain. That such pain may give rise to a disability is clear beyond cavil. See Brandon v. Gardner, 377 F. 2d 488 (4th Cir. 1967); Ber v. Celebrezze, 332 F.2d 293 (2d Cir. 1964); Anno., 23 A.L.R. 3d 1034 §§ 10[a] and 13[a] (1969). The basic question here is whether the claimant's subjective evidence of pain is believable, and since nothing in the record suggests the contrary, we think it is.

In Glass v. Secretary of Health, Education and Welfare, 517 F.2d 224 (6th Cir. 1975) the medical evidence indicated that the claimant suffered "horrible pain" caused by a back injury, that he "was unable to bend forward, stoop or reach," and that he cannot "perform any job that requires lifting, prolonged standing or walking." The claimant testified that he is "unable to sit longer than 10 or 15 minutes and that he needs to move about constantly or lie down." The law judge therein employed the same two-stage hypothetical questioning of a vocational expert as that used herein and, not surprisingly, the results were identical to those herein:*

Despite appellant's assertion of pain and the substantial objective basis for it, the Administrative Law Judge denied benefits based upon the testimony of a vocational expert.² When this expert

* Presumably, in light of the frequency with which this method of eliciting testimony from vocational experts appears in disability benefit cases, law judges are instructed to follow a uniform pattern of questioning when confronted with factual situations of this nature.

was asked whether there was any job that appellant could perform if his physical disabilities caused him pain of the severity to which he testified, he unequivocally replied that there was not. Only when the expert was asked a hypothetical question that required him to ignore appellant's assertion of pain did he testify that appellant was capable of engaging in light work that would permit him to stand and to sit at periodic intervals. [Emphasis supplied].

The court reversed the Secretary and directed entry of summary judgment for the claimant.

A virtually identical fact pattern appears in Noe v. Weinberger, 512 F.2d 588 (6th Cir. 1975). The claimant therein suffered from a back ailment in some respects similar to that of the appellant. It included "pain over lumbar back radiating down right and left legs" (see Tr. 132) and "considerable narrowing of the disc between L-4 and 5 and the lumbosacral disk" (see Tr. 120), although "there was no evidence of any old or recent fractures of the lumbar spine" as there is in this case. By virtue of this condition the claimant, as with the appellant herein, was "unable to bend his back and the slightest effort activates the pain and soreness" (See Tr. 132). Once again the law judge employed the same two-stage process of hypothetical interrogation of a vocational expert that was used in Glass as well as herein. Once again, one would not be shocked to discover, the results are the same. Under the assumptions of the first hypothetical in which the expert is asked to "assume that the claimant has the condition

about which he has testified and to the degree he has testified about it" the claimant is disabled. Under the second hypothetical, under which it is assumed that the claimant can perform " activity which would require a minimal amount of bending and lifting, one that would not require him to remain in one position for a long period, indicating that he might be able to stand or sit alternately at his own option according to his feelings," there appear hundreds of jobs the claimant is capable of performing. The difference between the two hypotheticals that the court relied on in reversing the Secretary also differentiates the two hypotheticals used in the present case:

Dr. Auvenshine's answer to the Administrative Law Judge's hypothetical question upon which the Administrative Law Judge rested his denial of benefits had little if any evidentiary value, since it omitted consideration of the pain and its consequences which disabled appellant (Id. at 596).

V

THE COURT BELOW ERRED IN AFFIRMING THE SECRETARY'S DENIAL OF BENEFITS TO THE CLAIMANT WHERE THE SECRETARY FAILED TO CONSIDER THE COMBINED EFFECT UPON THE CLAIMANT OF HIS VARIOUS AILMENTS.

In Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 42 (2d Cir. 1972), this court held that "all complaints [of a claimant] must be considered together in determining her work capacity," quoting Burns v. Celebrezze, 234 F. Supp. 1019, 1020 (W.D. N.C. 1964). "The Hearing Examiner cannot fragmentize

appellant's several ailments and the medical opinions regarding each of them so that he fails properly to evaluate their effect in combination upon appellant" [Citation omitted]. Colwell v. Gardner, 386 F.2d 56, 74 (6th Cir. 1967). In Tinsley v. Finch, 300 F. Supp. 247, 254 (D.S.C. 1969), the court stated:

In his opinion the hearing examiner noted each of claimant's medical conditions and proceeded to dispose of it as a basis for disability benefits. What the hearing examiner failed to do was to consider the effect of these conditions in combination upon claimant's employment opportunities. The hearing examiner is not allowed to fragmentize claimant's medical conditions and consider each ailment in isolation. He must consider their cumulative effect upon the claimant.

See also Swihel v. Richardson, 346 F. Supp. 930, 932, n. 1 (D. Neb. 1972); Chester v. Mathews, 403 F. Supp. 110, 117 (D. Md. 1975); Haskins v. Finch, 307 F. Supp. 1272, 1281 (D. Mo. 1969).

It is clear that the law judge in this case failed to satisfy the standard enunciated in the cases cited above for proper consideration of claimants with multiple ailments. In the present case, in addition to the claimant's back condition he also suffers from headaches (Tr. 42, 135), essential hypertension (Tr. 136), diabetes mellitus (Tr. 136), heel pain (Tr. 123, 143), and exogenous obesity (Tr. 136). The law judge herein first considers claimant's reports of head-

aches, then his hypertension, then his diabetes mellitus, and finally his back ailment, all separately and in isolation from one another (Tr. 15, 16). No attempt was made to consider the possible implications of the combined impact upon the claimant of these several ailments. As the court in Swihel v. Richarson, supra., noted:

Instead, it appears that each ailment was considered in isolation, and possibly each separate ailment by itself would not have been disabling. But each ailment when added to the others presents an entirely different perspective.

RELIEF SOUGHT

For all of the foregoing reasons, the claimant respectfully prays for an order reversing the judgment of the court below and the Secretary's denial of benefits, directing entry of judgment in favor of claimant and declaring claimant entitled to disability insurance benefits.

Respectfully Submitted,

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A D D E N D U M

Applicable Statutes

Section 205 (g) of the Social Security Act, 42 U.S.C.
405 (g) provides that:

Judicial Review

"g) Any individual after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow... As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive..."

Section 223 of the Act, 42 U.S.C., §423, provides that:

Section (a) (1) Every individual who---

" (A) Is insured for disability insurance benefits (as determined under subsection (c) (1),

" (B) has not attained the age of sixty-five,

" (C) has filed application for disability insurance benefits, and

" (D) is under a disability (as defined in subsection (d), shall be entitled to a disability insurance benefit...ending with the month preceding . . . the third month following the month in which his disability ceases."

Section (d) (1)

The term "disability" means--

- " (A) Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;"
- " (2) For purposes of Paragraph (1) (a) ---
- " (A) An individual. . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.
- " (3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques.
- " (5) An individual shall not be considered to be under a disability unless he furnishes such medical or other evidence of the existence thereof as the Secretary may require."

Receipt of the within Brief for Plaintiff-Appellant
is hereby acknowledged.

DATED: January 31, 1977

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By:

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